

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH**

Merrimack Superior Court
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NOTICE OF DECISION

**Daniel J Licata, ESQ
Office of Attorney General
33 Capital St Environmental Protection
Concord NH 03301**

Case Name: **State of NH, Dept. of Environmental Servs. v. Kevin M. Guay**
Case Number: **217-2008-EQ-00144**

Enclosed please find a copy of the court's order of August 30, 2010 relative to:

ORDER

August 31, 2010

William S. McGraw
Clerk of Court

(489)

C: J. Brandon Giuda, ESQ

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

New Hampshire Department of Environmental Services

v.

Kevin M. Guay

No. 217-2008-EQ-00144

ORDER

The petitioner, the New Hampshire Department of Environmental Services (“NHDES”), brought this action against the respondent, Kevin M. Guay, seeking an *ex parte* temporary restraining order, preliminary and permanent injunctive relief, and civil penalties for violating RSA 482-A—the Fill and Dredge in Wetlands Act—and RSA 485-A—the Water Pollution and Waste Disposal Act. On June 21, 2010, the court held a bench trial to determine whether to issue a permanent injunction and award civil penalties. Because the petitioner has sustained its burden of showing RSA 482-A and RSA 485-A violations, its requests for equitable relief and imposition of civil penalties are GRANTED as provided herein.

Since 2000, Mr. Guay has owned real property located at 30 Villanova Drive, Concord, New Hampshire. He purchased the property in order to develop and resell or rent it. The property contains upland terrain, a brook, wetlands, and a manmade pond. The brook and wetlands connect to Penacook Lake. Penacook Lake is the City of Concord drinking water reservoir. NHDES has classified Penacook Lake as a “Class A water.” A “Class A water” is a water “of the highest quality.” RSA 485-A:8. The discharge of sewage or wastes into Class A water is prohibited. *Id.*

In 2005, Mr. Guay obtained a permit to construct a single-family home on 30 Villanova Drive. Respondent’s Exh. B. In developing the property, Mr. Guay stripped a portion of the

property's natural vegetation, removed trees, excavated and re-graded the western slope of the property, and created a dirt driveway. Mr. Guay did not hire an environmental consultant before taking these actions.

In July 2006, Mr. Guay engaged Alan Moody, a septic system designer, to create a septic plan for his property. Petitioner's Exh. 76. NHDES reviewed and Mr. Moody's septic plan and approved it on October 30, 2006. According to the plan, Mr. Guay's property had a slope of 15% to 20% and an estimated seasonal high water table of 18 inches. Mr. Guay rejected Mr. Moody's septic plan, however, because he wanted the septic system located in a different area.

In November 2007, Mr. Guay hired Robert Phillips of All Clear Septic to create a new septic plan. Mr. Phillips' septic plan estimated the seasonal high water table at 67 inches. It also indicated that the slope on the western side of the property had been re-graded from a 15% to 20% slope to a 1:3 slope. The septic plan further indicated that within the first 25 inches of soil "is disturbed fill material" and the land near the wetlands contains "poorly drained soils." Petitioner's Exh. 7. Mr. Guay was responsible for re-grading the western slope of the property and placing the fill material noted on the plan.

After reviewing the plan, Mr. Guay hired Mr. Phillips to install the septic system and dig the foundation of the home he planned to build. The contract between Mr. Guay and Mr. Phillips did not require Mr. Phillips to provide erosion controls. Mr. Phillips subsequently applied for and obtained NHDES approval to install an individual sewage disposal system.

In January 2008, Mr. Phillips began digging the foundation. During this time, Mr. Guay began taking the dirt exhumed and spreading it around his property, toward the wetlands. On February 11, 2008, Mr. Phillips sent Mr. Guay a letter, stating his concern that Mr. Guay's activities on the property had resulted in fill entering the wetlands. He received no reply. On Feb-

ruary 21, 2008, Mr. Phillips sent a letter to NHDES, stating that he was no longer working on Mr. Guay's property. Mr. Phillips letter also stated that he had concerns about the site, including backfill materials entering the wetlands. Mr. Guay subsequently hired another contractor to finish the foundation. In February or March 2008, Mr. Guay installed a pre-fabricated home on the property.

On April 3, 2008, NHDES inspected Mr. Guay's property and observed sediment-laden water flowing from the construction site into the brook and wetlands, which empty into Penacook Lake. NHDES also observed that few, if any, erosion controls were in place and requested Mr. Guay to install them to prevent sediment from entering the brook, wetlands, and lake.

Between April 4, 2008 and April 12, 2008, NHDES established seven surface water quality-sampling stations on or near Mr. Guay's property. NHDES designed these sampling stations to test the turbidity level of: (1) surface water flowing onto the property; (2) surface water flowing through the construction area on the property; (3) the wetlands on the property; (4) the brook on the property; (5) the area where the brook entered Penacook Lake; and (6) Penacook Lake itself.

NHDES inspected Mr. Guay's property on April 4, 2008, April 9, 2008, April 12, 2008, April 14, 2008, April 15, 2008, April 16, 2008, April 17, 2008, April 21, 2008, and April 22, 2008. During these inspections, NHDES observed inadequate, missing, improperly installed, unmaintained, or otherwise ineffective erosion controls. NHDES also observed sediment-laden water flowing from the construction site on Mr. Guay's property into the wetlands, brook, and Penacook Lake. Additionally, NHDES tested the surface water quality during each inspection, finding at least one violation of state surface water quality standards on each date. Petitioner's Exh. 16.

On April 25, 2008, NHDES sought and obtained a temporary restraining order requiring Mr. Guay to take any and all legally available measures necessary to ensure that sediment-laden water did not leave his property. It also required Mr. Guay to hire a certified erosion and sediment control professional to stabilize his property and prevent sediment-laden water from leaving it. Mr. Guay became aware of this order on April 28, 2010.

NHDES also inspected Mr. Guay's property on April 29, 2008, April 30, 2008, and May 4, 2008. During these inspections, NHDES observed inadequate, missing, improperly installed, unmaintained, or otherwise ineffective erosion controls. NHDES also observed sediment-laden water flowing from Mr. Guay's property into the wetlands and brook on the property and into Penacook Lake. Additionally, NHDES tested the surface water quality during these inspections, finding at least one violation of state surface water quality standards on each date. Petitioner's Exh. 16.

On May 5, 2008, the court issued an assented-to preliminary injunction, requiring Mr. Guay *inter alia* to: (1) take any and all legally available measures necessary to ensure that sediment-laden water did not leave the property; and (2) hire a certified erosion and sediment control professional to stabilize his property and prevent sediment-laden water for leaving it. The order also provided that "[i]t is and shall be [Mr. Guay's] responsibility to ensure that he does not cause any future water quality violations."

Through the end of 2008, NHDES also inspected Mr. Guay's property thirteen additional—May 9th, June 6th, June 16th, June 18th, June 22nd, July 21st, July 24th, August 4th, August 7th, August 11th, September 9th, October 14th, and November 25th. Dry weather on June 18th and October 14th prevented NHDES from taking surface water samples on those dates; however, on the other eleven inspection dates, NHDES observed sediment-laden water flowing from Mr.

Guay's property into the wetlands and brook on his property and into Penacook Lake. NHDES also observed inadequate, missing, improperly installed, unmaintained, or otherwise ineffective erosion controls. During several inspections, NHDES further observed plumes of sediment extending approximately 100 to 200 feet into Penacook Lake from the area where the brook on Mr. Guay's property flows into it. NHDES surface water quality samples taken on May 9th, June 6th, June 16th, June 22nd, July 21st, July 24th, August 4th, August 7th, August 11th, September 9th, and November 25th indicated at least one violation of state surface water quality standards. Petitioner's Exh. 16.

NHDES wetlands personnel also inspected Mr. Guay's property on April 3, 2008, April 9, 2008, April 17, 2008, July 24, 2008, and November 25, 2008. During each inspection, NHDES wetlands personnel observed turbid water depositing sediment into the wetlands on Mr. Guay's property. NHDES determined that Mr. Guay did not have a permit to deposit sediment or otherwise fill the wetlands on his property.

In June 2008, Mr. Guay hired R. Jeffrey Byrd, P.E. to help with erosion control. Mr. Byrd submitted a Site Stabilization Plan to NHDES on June 20, 2008. The plan was approved and ready to implement in July 2008. Mr. Guay did not implement the plan that year.

On September 24, 2008, this court ruled on the petitioner's motion for contempt, finding that Mr. Guay had not complied with the court's May 5, 2008 preliminary injunction. On September 28, 2008, Mr. Guay filed for bankruptcy in the United States Bankruptcy Court for the District of New Hampshire. On October 15, 2008, Mr. Guay filed schedules with the bankruptcy court, indicating that he possessed approximately twice the number of assets compared to his liabilities. On November 25, 2008, the bankruptcy court issued an order, stating that the automatic

stay under 11 U.S.C. § 362 did not apply. The order also allowed the petitioner to pursue injunctive relief, civil penalties, and contempt sanctions.

NHDES argues that Mr. Guay violated RSA 485-A, the Water Pollution and Waste Disposal Act. The court agrees. RSA 485-A:8, I provides in relevant part: “Class A waters shall be of the highest quality.... There shall be no discharge of any sewage or wastes into waters of this classification.” RSA 485-A:2, XVI defines “waste” as “industrial waste or other waste.” RSA 485-A:2, VIII defines “other waste” as “... any other substance harmful to human, animal, fish or aquatic life.”

NHDES Surface Quality Regulations further state that “Class A waters shall contain no turbidity, unless naturally occurring.” Turbidity means “the quality or state of being turbid.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2426 (2002). Turbid means “thick or opaque with matter in suspension: cloudy or muddy in physical appearance.” *Id.* NHDES’s rule for protecting the purity of regulated watersheds states “[a] person shall not permit the condition or practice of whatever kind that may endanger the purity of the waters of [Penacook Lake] or its tributaries.” N.H. Admin. R. Env-Ws 386.21(13).

NHDES measures the turbidity of surface water in nephelometric turbidity units (“NTUs”). *See* N.H. Admin. R. Env-Ws 302.48. “For purposes of state enforcement actions, if a discharge causes or contributes to an increase in turbidity of 10 NTUs or more above the turbidity of the receiving water upstream of the discharge or otherwise outside of the visible discharge, a violation of the turbidity standard shall be deemed to have occurred.” N.H. Admin. R. Env-Wq 1703.11(d).

In this case, Mr. Guay violated RSA 485-A:8, I and the regulations promulgated under RSA chapter 485-A. NHDES observed turbid water flowing from the construction site on Mr.

Guay's property into the wetlands, brook, and Penacook Lake on the following dates in 2008: April 4th, April 9th, April 14th, April 15th, April 16th, April 17th, April 21st, April 22nd, April 28th, April 29th, April 30th, May 9th, June 6th, June 16th, June 22nd, July 21st, July 24th, August 4th, August 7th, August 11th, September 9th, and November 25th. NHDES also observed inadequate, missing, improperly installed, unmaintained, or otherwise ineffective erosion controls on those dates. During several of the inspections, NHDES further observed plumes of sediment extending approximately 100 to 200 feet into Penacook Lake from the area where the brook on Mr. Guay's property flows into Penacook Lake. NHDES surface water quality samples taken on the above inspection dates violated state surface water quality standards. Moreover, over-turbidity is recognized as harmful to human, animal, fish or aquatic life. *See Louisiana v. Lee*, 758 F.2d 1081, 1085 (5th Cir. 1985) (recognizing turbidity as an "environmentally disrupting" effect of dredging); *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 376 (C.A.D.C. 1981) (finding that "[i]ncreased river turbidity and sedimentation can interfere with fish habitats and upset the ecology of backwater areas.")

Based on the foregoing, the court finds that Mr. Guay violated RSA 485-A:8, I by knowingly depositing other waste and creating over-turbidity in the wetlands and brook on his property and Penacook Lake on the following dates in 2008: April 4th, April 9th, April 12th, April 14th, April 15th, April 16th, April 17th, April 21st, April 22nd, April 28th, April 29th, April 30th, May 9th, June 6th, June 16th, June 22nd, July 21st, July 24th, August 4th, August 7th, August 11th, September 9th, and November 25th.

NHDES also argues that Mr. Guay violated RSA 482-A, the Fill and Dredge in Wetlands Act, on April 3, 2008, April 9, 2008, April 17, 2008, July 24, 2008, and November 25, 2008. The court agrees. RSA 482-A:3, I provides in relevant part: "No person shall excavate, remove, fill,

dredge or construct any structures in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state without a permit from the [NHDES].” The term “fill” as used in the above statute means “to place or deposit materials in or on a wetland, surface water body, bank or otherwise in or on an area within the jurisdiction of the [NHDES].” N.H. Admin. Rule Env-Wt 101.40.

In this case, Mr. Guay violated RSA 482-A:3, I. NHDES inspected Mr. Guay’s property on April 3, 2008, April 9, 2008, April 17, 2008, and July 24, 2008. During each inspection, NHDES wetlands personnel observed sediment-laden water flowing from the construction site into the wetlands. NHDES wetlands personnel also observed inadequate erosion controls on the property. NHDES further determined that Mr. Guay did not have a permit to fill the wetlands on his property. Thus, based on the testimony and exhibits presented at trial, the Court finds that Mr. Guay knowingly deposited sediment in the wetlands on his property without a permit on April 3, 2008, April 9, 2008, April 17, 2008, and July 24, 2008, contrary to RSA 482-A:3, I.

Mr. Guay does not dispute the violations. He argues, however, that Mr. Phillips and All Clear Septic were responsible for the erosion problems that developed on his property in 2008. The court disagrees. The evidence indicates that Mr. Guay stripped a portion of his property’s natural vegetation, removed trees, excavated and re-graded the western slope of the property, and created a dirt driveway before hiring Mr. Phillips. The contract between Mr. Guay and Mr. Phillips did not provide that Mr. Phillips was responsible for erecting and maintaining erosion controls at the construction site. Moreover, Mr. Guay took the dirt Mr. Phillips had exhumed in building the foundation and spread it across his property, toward the wetlands, without Mr. Phillips’ knowledge. Thus, the court rejects Mr. Guay’s claim that Mr. Phillips and All Clear Septic were responsible for the 2008 erosion problems that developed on the property.

Based on the violations, NHDES requests that the court issue a permanent injunction.

Based on the evidentiary record, the court finds that NHDES has sustained its burden of showing that a permanent injunction is required to prevent Mr. Guay from violating RSA 485-A and RSA 482-A in the future. Accordingly, the court's May 5, 2008 preliminary injunction order is made permanent with the addition that Mr. Guay is required to file annual monitoring reports with the NHDES documenting compliance with the wetlands restoration plan through photographs and reports of the Certified Wetland Scientist for a period of three years following the completion of the restoration.

NHDES also requests that the court impose civil penalties on Mr. Guay for violating RSA 485-A:8 twenty-two times and RSA 482-A:3 five times. Under RSA 485-A:22, II and RSA 482-A:14 the court may award up to \$10,000 in civil penalties for each violation of RSA 485-A:8 and RSA 482-A:3. The maximum civil penalties the court may award in this case are \$220,000 for violating RSA 485-A:8 twenty-two times and \$50,000 for violating RSA 482-A:3 five times. The court believes that such fines are appropriate given the egregious nature of the continuing violations and Mr. Guay's persistent effort to evade responsibility by pointing a finger at Mr. Phillips, the state (for participating in the bankruptcy proceeding), the weather and any other person or factor other than himself. Accordingly, NHDES's request for the imposition of civil penalties is GRANTED. The court imposes civil penalties of \$220,000 for violating RSA 485-A:8 twenty-two times and \$50,000 for violating RSA 482-A:3 five times.

The foregoing is not fully dispositive. While the civil penalties are appropriate, the public interest dictates that Mr. Guay devote his resources to restoration and that Mr. Guay, as a developer who is "wetlands challenged," refrain from further violations. Accordingly, the court will SUSPEND a substantial portion of the civil penalties imposed. Within 20 days of this order,

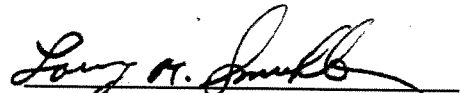
NHDES shall submit an affidavit quantifying the cost to the state of its enforcement actions in this case. Mr. Guay may file a response, which will be due no later than 10 days thereafter.

Based on the affidavit, the court will determine how much of the civil penalties are to be suspended. Mr. Guay is placed on notice that the suspension of civil penalties is conditioned on compliance with the terms of the permanent injunction and no further conduct inconsistent with RSA 482-A or RSA 485-A. If Mr. Guay does not comply with the conditions, the state may move to bring forward and impose the suspended civil penalties.

NHDES submitted requests for findings of fact and rulings of law. The court's findings of fact and rulings of law are embodied in its narrative discussion above. Thus, NHDES's requests are GRANTED to the extent that they are consistent with this order; otherwise, they are DENIED. *See Geiss v. Bourassa*, 140 N.H. 629, 632-33 (1996).

So ORDERED.

Date: August 30, 2010


LARRY M. SMUKLER
PRESIDING JUSTICE